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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

THE PEOPLE,

Plaintiff and Respondent,

v.

STEVEN FRANK MACHADO, JR.,

Defendant and Appellant.

E063575

(Super.Ct.No. BAF1400366)

O P I N I O N

APPEAL from the Superior Court of Riverside County. David A. Gunn, Judge.

Affirmed with directions.

Susan S. Bauguess, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, and Eric A. Swenson and Felicity Senoski, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant and appellant, Steven Frank Machado, Jr., of three counts of second degree robbery (counts 1, 3, & 5; Pen. Code, § 211)<sup>1</sup> and four counts of assault with a firearm (counts 2, 4, 6, & 7; § 245, subd. (a)(2)). The jury additionally found defendant had personally used a firearm in his commission of the offenses in counts 1, 3, and 5. (§§ 12022.53, subd. (b), 1192.7, subd. (c)(8).) Defendant admitted he had suffered a prior conviction which qualified as a prior serious felony (§ 667, subd. (a)) and prior strike (§§ 667, subds. (c), (e)(1), 1170.12, subd. (c)(1)). The court sentenced defendant to an aggregate term of imprisonment of 31 years eight months. On appeal, defendant contends the court erred in denying his *Romero*<sup>2</sup> motion and in failing to stay punishment on counts 2, 4, and 6. We shall modify the judgment to stay sentence on counts 2, 4, and 6. In all other respects, the judgment is affirmed.

## I. FACTS

On May 12, 2014, around 6:50 p.m., defendant drove up to the convenience store at a gas station in Cabazon in a white pickup truck, parked his vehicle, and walked inside. Once inside, defendant grabbed the cashier, pointed a gun at her, and told her to give him all the money in the register. The cashier emptied the register of all the money, including quarters and four gold dollar coins, and gave it to defendant. Defendant then exited the building taking a pair of sunglasses as he left. The People played video surveillance recordings of the robbery for the jury.

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<sup>1</sup> All further statutory references are to the Penal Code unless otherwise indicated.

<sup>2</sup> *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.

Around 10 minutes later, defendant entered another convenience store and pointed a gun at both the owner and the cashier who were behind the register. Defendant demanded money from the owner. He told the cashier to put her hands up. The owner opened the register, put the money into a bag, and gave the bag to defendant. Another employee came out of the back into the store; defendant pointed the gun at him and hit him in the chest with the gun in one hand and a fist with the other. Defendant grabbed a bag of chips as he exited the store. A video surveillance recording of the robbery was played for the jury.

As defendant left, the cashier looked outside the window in an attempt to obtain defendant's vehicle's license plate number; defendant turned around, pointed the gun at her, and shook his head indicating "no." The cashier noted that defendant left in an older, white, two-door truck with a water tank in the back. The other employee exited the store, got into his own vehicle, and followed defendant in an attempt to obtain the license plate number. He was only able to obtain a partial license plate number. He also described defendant's vehicle as a white pickup truck with a water tank in its bed.

Around 8:00 p.m., officers responding to the robbery call found a white pickup truck with a water tank in the back parked on the side of the freeway. Shortly thereafter, defendant pulled up as the passenger in a vehicle. Defendant exited the car carrying a gas can. A forensic technician called to the scene found 23-26 quarters, two gold coins, an envelope with defendant's name imprinted thereon, and a backpack marked "Steven" inside the truck. A fingerprint taken from inside the vehicle matched defendant.

## II. DISCUSSION

### A. *Romero*

Defendant contends the court erred in denying his oral motion to strike his prior strike conviction. We disagree

Prior to sentencing, defense counsel made an oral motion to strike defendant's prior conviction for terrorist threats. (§ 422.) The court noted: "The problem in a [section] 422 [offense], of course, is if the threat is one that is immediate and has to be immediate and the intention has to be there, if a person is armed, if other factors are there, again, which I don't have any information concerning that. It can be a very serious matter." The court further explicated: "The fact is also that [defendant] continued to get [section] 422[] [convictions], even though they were filed as misdemeanors, even after—I am sure he was advised at the time that would be a strike offense. It is a serious offense, it is a serious felony, and continued to get at least two [section] 422 [convictions], I believe after that period of time. He had [section] 243[] [convictions] prior to the strike. I don't know if those involved the same victim or not. Again, I don't have any information on those, other than he sustained those convictions. So, I mean, he has engaged in a history of violent criminal conduct. It has become more violent with this case. [¶] Again, it is not the type of criminal history that would lead the Court to want to exercise its discretion and strike the strike in this matter . . . ." The court denied the motion.

“[A] court’s failure to dismiss or strike a prior conviction allegation is subject to review under the deferential abuse of discretion standard.” (*People v. Carmony* (2004) 33 Cal.4th 367, 374.) Under this standard, the defendant bears the burden of establishing an abuse of discretion. In the absence of such a showing, the trial court is presumed to have acted correctly. The appellate court may not substitute its judgment for that of the trial court when determining whether the trial court’s decision to strike the prior was proper. (*Id.* at pp. 376-377.)

“‘[I]n ruling whether to strike or vacate a prior serious and/or violent felony conviction allegation or finding under the Three Strikes law, on its own motion, “in furtherance of justice” pursuant to . . . section 1385[, subdivision] (a), or in reviewing such a ruling, the court in question must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme’s spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies.’ [Citation.]” (*People v. Carmony, supra*, 33 Cal.4th at p. 377.) “‘[W]here the record demonstrates that the trial court balanced the relevant facts and reached an impartial decision in conformity with the spirit of the law, we shall affirm the trial court’s ruling, even if we might have ruled differently in the first instance’ [citation].” (*Id.* at p. 378.)

The court's ruling is fully supported by the record. Defendant had a total of 10 convictions, excluding the instant case, since 1999. Defendant sustained his first felony conviction in 2000. In 2004, defendant sustained a conviction for misdemeanor spousal battery for which he received probation. Defendant violated the terms of that probation on three occasions. In 2004, defendant sustained another conviction for misdemeanor spousal battery for which he again received probation. Defendant violated the terms of that grant of probation twice. Also in 2004, defendant sustained the conviction for the prior strike, felony criminal threats. Defendant received a year in jail and was released on probation, but violated that grant of probation twice.

In 2009, defendant sustained a conviction for reckless driving and was placed on probation. Defendant violated the terms of his probation twice. In 2010, defendant was convicted of misdemeanor corporal injury on the mother of his child (Pen. Code, § 273.5, subd. (e)), vandalism (Pen. Code, § 594, subd. (b)(1)), and criminal threats (Pen. Code, § 422). Defendant was again granted probation, but violated probation seven times. In 2012, defendant was again convicted of misdemeanor criminal threats. Also in 2012, defendant was convicted of felony possession of a controlled substance. (Health & Saf. Code, § 11377, subd. (a).) Defendant violated the terms of his probation in that case three times. Defendant was on probation when he committed the instant offenses.

Thus, the court considered both the offenses for which defendant had currently been convicted in context with defendant's criminal history as a whole. Defendant had an extensive criminal history, including convictions for violent offenses, had been

convicted of violent offenses in the instant case, had repeated probation violations, and was on probation when he committed the offenses in the current case. The court acted within its discretion in denying defendant's motion to strike his prior strike conviction.

*B. Section 654*

Defendant contends the court should have stayed punishment on counts 2, 4, and 6, the convictions for assault with a firearm. The People agree the sentence on count 2 should be stayed, but argue imposition of concurrent sentences on counts 4 and 6 was proper. We agree with defendant.

“Section 654 provides that ‘[a]n act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision.’ The section ‘applies when there is a course of conduct which violates more than one statute but constitutes an indivisible transaction.’ [Citation.] Generally, whether a course of conduct is a divisible transaction depends on the intent and objective of the actor: ‘If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one.’ [Citation.]” (*People v. Alvarez* (2009) 178 Cal.App.4th 999, 1006.)

“‘[T]he purpose of section 654 “is to insure that a defendant’s punishment will be commensurate with his culpability.’” [Citation.] ‘It is [the] defendant’s intent and objective, not temporal proximity of his offenses, which determine whether the transaction is indivisible.’ [Citation.] “‘The defendant’s intent and objective are factual

questions for the trial court; [to permit multiple punishments,] there must be evidence to support [the] finding the defendant formed a separate intent and objective for each offense for which he was sentenced.” [Citation.]” (*People v. Capistrano* (2014) 59 Cal.4th 830, 886, fn. omitted.)

“[S]ection 654 does not apply to crimes of violence against multiple victims. [Citation.] The reason is that “[a] defendant who commits an act of violence with intent to harm more than one person or by means likely to cause harm to several persons is more culpable than a defendant who harms only one person.” [Citation.]” (*People v. Correa* (2012) 54 Cal.4th 331, 341, fn. omitted.)

Here, the jury convicted defendant in counts 1, 3, and 5 for separate offenses of robbery against, respectively, the same victims against whom the jury convicted him of assault with a firearm in counts 2, 4, and 6. Robbery requires the use of force or fear. (§ 211.) Here, defendant’s assault with the firearm was the element of force or fear requisite to sustain his conviction for the robberies. There is no evidence defendant assaulted the victims with the firearm for any other purpose than to effectuate the robberies. Thus, the evidence is not susceptible to an argument that defendant harbored separate intents or objectives from the robberies in engaging in the assaults. Rather, the assaults were part and parcel of defendant’s indivisible transaction of committing the robberies. (*People v. Flowers* (1982) 132 Cal.App.3d 584, 589 [§ 654 proscribes a defendant’s conviction for both assault and robbery where the assault was committed to achieve the robbery]; *People v. Latimer* (1993) 5 Cal.4th 1203, 1216-1217 [§ 654 bars



punishment for both kidnapping and sexual offenses where kidnapping was committed for the purpose of engaging in sexual offenses].)

The People argue the multiple victim exception is applicable here. This would be true had defendant not been convicted of robbery as to each victim. However, here, defendant sustained convictions of robbery as to each victim. Thus, if defendant committed each assault with a firearm for a purpose separate from that of committing the robberies, there would be insufficient evidence to sustain the robbery convictions. Therefore, the multiple victim exception is inapplicable. The court should have stayed imposition of punishment on counts 2, 4, and 6.

### III. DISPOSITION

The judgment is modified by staying sentence on counts 2, 4, and 6. The trial court is directed to modify and forward to the Department of Corrections and Rehabilitation a new abstract of judgment and sentencing minute order. As so modified, the judgment is affirmed.

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McKINSTER  
Acting P. J.

We concur:

CODRINGTON  
J.

SLOUGH  
J.